IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5

ARTHUR F. QUERN, Director, Illinois Department of Public Aid, et al.,

Appellants,

vs.

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., on their own behalf and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation; and JANE DOE, on her own behalf and on behalf of all others similarly situated,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

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1. Jasper F. Williams, M.D., and Eugene F. Diamond, M.D., and the United States, intervening defendants below, are also appellants in this case.

Appellant, Arthur F. Quern, Director of the Illinois Department of Public Aid, defendant below, appeals from the Final Judgment and Order of the United States District Court for the Northern District of Illinois, Eastern Division, entered April 30, 1979. Appellant submits this Jurisdictional Statement to show that this Court has jurisdiction of this Appeal and that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

OPINIONS BELOW

The Memorandum Opinion of the District Court, dated April 29, 1979, is unreported and appears in the Appendix hereto at p. A-21, *infra*. Prior opinions of the United States Court of Appeals for the Seventh Circuit are reported at 572 F. 2d 582 (7th Cir. 1978) ("Zbaraz I") and 596 F. 2d 196 (7th Cir. 1979) ("Zbaraz II"). "Zbaraz II" is reprinted in the Appendix hereto at p. A-1, *infra*.

JURISDICTION

This is a class action brought under the Civil Rights Act (42 U.S.C. § 1983) challenging an Illinois statute, P.A. 80-1091, insofar as it is alleged to deny indigent, pregnant women public funds for abortions deemed "medically necessary" by their physicians. Plaintiffs claim that Illinois' failure to fund all "medically necessary" abortions under its public assistance programs violates their rights under Title XIX of the Social Security Act (Medicaid) (42 U.S.C. § 1396 *et seq.*) and the Ninth and Fourteenth Amendments to the United States Constitution. The action in its present posture also involves the constitutional validity under the Fifth Amendment to the United States Constitution of a federal statute, Section 210, Pub. L. 95-480 (1978) (an

amendment to Title XIX, commonly known as the "Hyde Amendment"), which permits states participating in the Medicaid program to limit funding to the categories of abortions specified in that amendment.

The Final Judgment and Order of the District Court for the Northern District of Illinois, invalidating on equal protection grounds both the Illinois and federal statutes, was entered on April 30, 1979. See, p. A-43, *infra*.

Appellant Quern filed his original notice of appeal to this Court in the District Court on May 2, 1979. An amended notice of appeal was duly filed on May 8, 1979. See, p. A-56, *infra*.

This appeal is being docketed in this Court within sixty (60) days from the filing of the original notice of appeal in accordance with Supreme Court Rule 13(1). The jurisdiction of this Court in being invoked under 28 U.S.C. § 1252. The following cases sustain the jurisdiction of this Court to review the judgment below on direct appeal from the District Court: *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 304 U.S. 243 (1938); United *States* v. *Raines*, 362 U.S. 17 (1960); and *McLucas* v. *DeChamplain*, 421 U.S. 21 (1975).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

Ninth Amendment, United States Constitution:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Fourteenth Amendment, United States Constitution:

> Section 1. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Section 210, Pub. L. 95-480, 92 Stat. 1586:

> None of the Funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.
>
> Nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy.

P.A. 80-1091, Ill. Rev. Stat. Supp. (1977) ch. 23 §§ 5-5, 6-1, 7-1:

> § 5-5. *Medical Services.*
>
> The Illinois Department, by rule, shall determine the quantity and quality of the medical assistance for which payment will be authorized, and the medical services to be provided, which may include all or part of the following: . . . (15) any other medical care, and any other type of remedial care recognized under the laws of this State, but not including abortions, or induced miscarriages or premature birth, unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.

> § 6-1. *Eligibility requirements.*
>
> • • •
>
> Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of the physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.
>
> § 7-1. *Eligibility requirements.*
>
> Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care, or burial shall be given under this Article to or in behalf of any person who meets the eligibility conditions of Section 7-1.1 through 7-1.3, except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induce premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.

QUESTIONS PRESENTED

1. Whether state funding of abortions necessary for the preservation of the life or the physical or mental health of an indigent woman as determined in accordance with the professional judgment of a licensed physician exercised in light of all factors relevant to her health, is a fundamental constitutional right.

2. Whether the Fourteenth Amendment's equal protection clause imposes a constitutional obligation upon the State of Illinois to fund all medically necessary abortions prior to fetal viability to preserve the physical or mental health of pregnant indigent women without regard to classifications based on kind and degree of medical need.

3. Whether the State of Illinois, through its normal democratic processes may make a value judgment favoring child birth over abortion and to implement that judgment by the allocation of public funds based upon kind and degree of medical need to preserve the physical health of pregnant indigent women.

4. Whether P.A. 80-1091 as modified by the Hyde Amendment to the Social Security Act imposes an unreasonable standard of predictive certainty upon medicaid physicians for certification of abortions where "the life of the mother would be endangered . . . or . . . where severe and long lasting physical health damage to the mother would result if the pregnancy were carried to term . . ." which results in a substantial increase in maternal morbidity and mortality among indigent pregnant women.

STATEMENT OF THE CASE

Appellant, Arthur F. Quern, is Director of the Illinois Department of Public Aid and in that capacity is responsible for the administration of the Illiois Public Aid Code, *Ill. Rev. Stat.*, Ch. 23, § 1-1 *et seq.* (1977). The Illinois Department of Public Aid is the "single state agency" designated to administer the Illinois state plan for medical assistance pursuant to Title XIX of the Social Security Act, 42 U.S.C. § 1396a(a)(5); *Ill. Rev. Stat.*, Ch. 23, § 5-1 *et seq.* (1977).[2] Director Quern is a defendant in this action.

In 1977 the Illinois Legislature in response to the decisions of this Court in *Beal* v. *Doe*, 432 U.S. 438 (1977); *Maher* v. *Roe*, 432 U.S. 464 (1977) and *Poelker* v. *Doe*, 432 U.S. 519 (1977), and Congressional enactment of the "Hyde Amendment" to Title XIX of the Social Security Act [Pub. L. 94-439, § 209, 90 Stat. 1434] enacted P.A. 80-1091, *Ill. Rev. Stat. Supp.* (1978) Ch. 23, §§ 5-5, 6-1, 7-1 which excluded from the scope of its medical assistance program medical services and payment for abortions unless in the opinion of the physician an abortion is "necessary for the preservation of the life of the woman seeking such treatment".

Shortly after its enactment, P.A. 80-1091 was challenged by the plaintiffs in this case by the filing of a class action under the Civil Rights Act (42 U.S.C. § 1983) in the Dis-

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2. Director Quern also administers two wholly state authorized and funded public assistance programs—the Genally Assistance program, *Ill. Rev. Stat.* (1977) ch. 23, § 6-1; the Aid to the Medically Indigent program, *Ill. Rev. Stat.* (1977) ch. 23, § 7-1 *et seq.*

trict Court. Alleging jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3), (4), plaintiff-physicians Zbaraz and Motew claimed that P.A. 80-1091 denied them and their indigent women patients needing medically necessary abortions their rights under the Social Security Act, and the Ninth and Fourteenth Amendments to the United States Constitution. Complaint, ¶ 1. Plaintiffs sought declaratory and injunctive relief for themselves and on behalf of two classes of persons affected by the statute, namely, a physician class and a class of all aggrieved women patients of such physicians.

On December 13, 1977, Jasper F. Williams, M.D. and Eugene F. Diamond, M.D., pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure, sought leave of court to intervene in the lawsuit as parties defendant in order to protect their own economic interests and for the purpose of representing the interests of unborn children which would be impaired by a ruling in favor of the plaintiffs. The motion for intervention was opposed by the plaintiffs and was accordingly taken under advisement by the court.

Because the District Court believed that the "life-preservation" standard utilized in P.A. 80-1091 could be interpreted by Illinois courts in a way that would avoid the federal statutory and constitutional challenges, an abstention order was entered by the District Court on December 21, 1977 in order to give the Illinois courts an opportunity to definitively construe the new legislation in the face of a claim that the statute excluded funding for "medically necessary" abortions as defined by the plaintiffs.

Plaintiffs appealed the abstention order to the United States Court of Appeals for the Seventh Circuit. Pending the outcome of the appeal, the Seventh Circuit issued an

injunction against enforcement of the Illinois statute and compelled the state to fund all "therapeutic" abortions. Relying on this Court's language in *Doe* v. *Bolton,* 410 U.S. 179, 192 (1973), the Court of Appeals defined "therapeutic" to mean "medically necessary or medically indicated according to the professional medical judgment of a licensed physician in Illinois, exercised in light of all factors affecting a woman's health." In *Zbaraz* v. *Quern,* 572 F. 2d 582 (7th Cir. 1978) ("Zbaraz I") the Seventh Circuit reversed the District Court's abstention order but intimated no view on the merits of the relief plaintiffs were seeking. The Court dissolved its injunction and remanded the case for expeditious consideration of preliminary injunctive relief.

On remand, plaintiffs filed a motion for leave to have Jane Doe joined as a party plaintiff and for leave to file amended and supplemental pleadings. The motion alleged that Jane Doe was a recipient of Aid to Families with Dependent Children ("AFDC") public assistance, 42 U.S.C. §§ 601 *et seq.,* and medical assistance under the "Medicaid" program, 42 U.S.C. § 1396 *et seq.* Plaintiff Doe was described as a 38 year old woman who had had nine previous pregnancies, was pregnant again and desired to have an abortion. Accompanying the motion was the affidavit of David Zbaraz, M.D. which stated that he had reviewed the medical records of Jane Doe who had recently been examined by two other physicians on the staff of Michael Reese hospital in Chicago, Illinois. Those records disclosed that Jane Doe had a history of varicose veins and thrombophlebitis (blood clots) of the left leg. In Dr. Zbaraz's professional opinion, on the basis of the medical records he reviewed, Jane Doe's varicose veins would recur if her pregnancy were to continue and there existed a 30% risk

that the thrombophlebitis would recur necessitating hospitalization and bed rest if the fetus were carried to term.

Dr. Zbaraz concluded that an abortion was medically necessary for Jane Doe, though not necessary to preserve her life. The District Court by Order of April 25, 1979 granted plaintiffs leave to join Jane Doe as a party plaintiff and permitted the filing of amended pleadings. Thereafter the parties, including the movants for intervention as party defendants, filed cross motions for summary judgment.

On May 15, 1978 the District Court issued a memorandum opinion which (1) granted the motion to intervene of Jasper F. Williams, M.D. and Eugene F. Diamond, M.D.; (2) certified two Rule 23(b) (2) classes;[3] (3) denied Defendant Quern's motion to dismiss for want of jurisdiction; and (4) granted plaintiff's motion for summary judgment based solely on the statutory issues raised in the complaint.

The court found that Section 209 of Pub. L. 95-205 (the "Hyde Amendment" to the Departments of Labor and Health, Education and Welfare Appropriations Act for 1978) was not intended by Congress to alter the substantive requirements of Title XIX with respect to state funding of medically necessary abortions. Construing Title XIX to oblige participating states to fund all medically neces-

3. The classes certified by the District Court consist of (1) all pregnant women eligible for the Illinois medical assistance programs for whom an abortion is medically necessary but not necessary for the preservation of their lives and who wish such abortion performed, and (2) all Illinois physicians who are certified to obtain reimbursement for necessary medical services rendered to and who perform medically necessary abortions for, persons eligible for medical services under [the "Illinois medical assistance programs"].

sary services, the District court concluded that P.A. 80-1091, by denying funds for abortions deemed "medically necessary" in the discretion of attending physicians, was inconsistent with the objectives of the Act, 42 U.S.C. § 1396, the "reasonable standards" requirement of § 1396a(a)(17) and implementing regulations governing the "amount, duration and scope" of services, 42 C.F.R. § 449.10(a)(5)(i).

Upon appeal to the United States Court of Appeals for the Seventh Circuit, that Court again reversed, *Zbaraz* v. *Quern,* 596 F. 2d 196 (7th Cir. 1979) ("Zbaraz II"), p. A-1, *infra.* The Court in "Zbaraz II", agreeing with First Circuit's decision in *Preterm, Inc.* v. *Dukakis,* 591 F. 2d 121 (1st Cir. 1979) *cert. denied,* —— U.S. ——, 47 L.W. 3739 (May 15, 1979), held that the Hyde Amendment to the Medicaid Act was intended by Congress to amend Title XIX in regard to abortions, and that under the Medicaid Act, as amended, Illinois could limit medicaid funding to the categories of abortions specified in that amendment. Consequently, Illinois was free to deny funding for all "medically necessary" abortions which a physician could not certify as falling under one of the designated Hyde Amendment categories.

There remained, however, in the Court's opinion serious constitutional issues which the District Court on remand was directed to consider, including "whether the Hyde Amendment, by limiting funding for abortions to certain circumstances even if such abortions are medically necessary, violates the Fifth Amendment in view of the facts that no other category of medically necessary care is subject to such constraints and that abortion has been recognized as a fundamental right." 596 F. 2d at 202; p. A13, *infra.*

Pursuant to the mandate of the Seventh Circuit, the District Court by Order dated February 15, 1979 (p. A17,

infra), modified its permanent injunction entered on May 15, 1978 so as to require Illinois to fund all Hyde Amendment abortions in its enforcement of P.A. 80-1091 thereby expanding eligibility for abortion funding to cover rape and incest victims and those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Since the constitutionality of a federal statute had been drawn into question, Judge Kirkland certified this fact to the Attorney General of the United States pursuant to 28 U.S.C. § 2403(a), Order of February 22, 1979, (p. A19, *infra*) and directed the Attorney General to notify the court whether the United States intended to seek permission to intervene for presentation of evidence and for argument on the question of the Hyde Amendment's constitutionality.

Leave to intervene was granted the United States by Order of March 8, 1979 (p. A20, *infra*). Thereafter each party submitted to the Court a motion for summary judgment supported by briefs addressing the constitutional issues. Due to health reasons, Judge Kirkland recused himself prior to ruling and the case was reassigned to Judge Grady.

In a memorandum opinion dated April 29, 1979 (p. A21, *infra*) Judge Grady held that the Hyde Amendment and P.A. 80-1091 (as modified by court order) were constitutionally infirm as violative of the plaintiffs' right to equal protection of the laws. Finding that this Court's decision in *Maher* v. *Roe,* 432 U.S. 464 (1977) precluded any claim of a fundamental right to a state-funded abortion, or that a state's refusal to fund abortions amounted to an unconstitutional penalty, the Court declined to apply strict

judicial scrutiny to either statute and instead sought to determine if there were any legitimate state interests which were rationally related to the legislative classification at issue.

The Court rejected the state's purported interest in "fiscal frugality" since the costs attendant to childbirth far exceed those of abortion.[4] Furthermore, with respect to the state's acknowledged interest in fetal life, the Court found as a factual predicate that the employment of Hyde Amendment criteria will necessarily result in increased maternal morbidity and mortality among indigent pregnant women and consequently the State could have "no legitimate interest in preserving the life of a non-viable fetus at the cost of increase maternal morbidity and mortality." Memorandum Opinion, p. A37, *infra.*

Accordingly, Judge Grady granted partial summary judgment to both plaintiffs and defendants, Final Judgment and Order entered April 30, 1979, ¶4, p. A45, *infra.* The federal and state abortion funding policies were held unconstitutional as applied prior to fetal viability. After fetal viability, the court ruled that defendants were free under equal protection standards to enforce such policies.

Defendant Quern and intervening defendants Williams and Diamond requested the District Court to stay its Final

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4. In briefing the constitutional issues, Appellant Quern never advanced the argument that P.A. 80-1091 was supported by an interest in "fiscal frugality". Rather, based upon Mr. Justice Powell's statements in *Maher*, the interest put forward was the authority of the state to make a value judgment favoring childbirth over abortion and to implement that judgment by the allocation of public funds for abortions based upon relative degrees of need, i.e. an interest in "fiscal autonomy".

Judgment and Order of April 30, 1979. In addition, Defendant Quern sought an order requiring the federal government to reimburse the State of Illinois for all medically necessary abortions required to be performed under the court's order with respect to recipients of medical assistance under Title XIX of the Social Security Act, 42 U.S.C. § 1396, since that Title contemplates a scheme of cooperative federalism under which participating states are reimbursed for approximately 50% of the total amounts expended for medical assistance. 42 U.S.C. § 1396b(a)(6). The Assistant United States Attorney representing the United States Government stated in open court that the Department of Health, Education and Welfare did not intend to reimburse Illinois for any non-Hyde Amendment medically necessary abortions which would be performed and funded under the District Court's Order. The District Court denied both stay motions and failed to act upon Defendant Quern's Motion for federal reimbusement. Orders entered April 30, 1979, p. A41, A42, *infra.*

On May 2, 1979, Defendant Quern filed his Notice of Appeal from the Final Injunction and Order of April 30, 1979, indicating that the appeal would be made directly to the Supreme Court of the United States. On May 8, 1979, the state defendant filed an Amended Notice of Appeal in order to fully comply with the requirements imposed by Rule 10, Rules of the Supreme Court, which provides that "the notice of appeal shall specify . . . the statute or statutes under which the appeal to this Court is taken". The Amended Notice specified that the appeal is pursuant to 28 U.S.C. § 1252.

Director Quern and intervenors Williams and Diamond then applied to Mr. Justice Stevens, Circuit Justice for the Seventh Circuit, for a stay of the order of the District Court, No. A-958, No. A-967. The Solicitor General on behalf of the United States filed a memorandum recommending that the applications for a stay should be granted. On May 24, 1979, Mr. Justice Stevens, in a written opinion which intimated no view on the merits of the appeal, declined to grant a stay. —— U.S. ——, 47 L.W. 3772 (May 29, 1979) Thereafter, applicants in No. A-958 brought the application for a stay before Mr. Justice Rehnquist who, in turn, submitted it to the entire Court which denied the application without opinion. —— U.S. ——, 47 L.W. 3786 (June 5, 1979).

THE QUESTIONS ARE SUBSTANTIAL

> [Abortion] involves the most basic and volatile principles about which men can differ: life, death, liberty, privacy, our traditions, our ideals, our moral values.
> *Byrn* v. *New York City Health & Hospital Corp.*, 38 App. Div. 2d 316, 324, 329 NYS 2d 722, 729, *aff'd.* 31 N.Y. 2d 194, 286 N.E. 2d 887, 335 NYS 2d 390 (1972).
>
> The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents.
> *Maher* v. *Roe,* 432 U.S. 464, 469 (1977).

The question of the constitutional validity of the federal "Hyde Amendment" policy limiting government funding of abortions and its state progeny, such as Illinois' P.A. 80-1091, has never been given plenary consideration before by the Court.[5]

It is now well-settled that during the first trimester of pregnancy, the state may not infringe upon a woman's right to choose between childbirth and abortion. *Roe* v. *Wade,* 410 U.S. 113 (1973). During this period the right of a woman to seek an abortion and the right of her doctor to provide that abortion is considered a private matter:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or

5. See, *Califano* v. *McRae,* 433 U.S. 916 (1977) vacating in the wake of *Maher* v. *Roe* a decision that had declared the Hyde Amendment to be unconstitutional.

> as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. 410 U.S. at 153.

It is equally well-established that a state constitutionally may decline to pay for "the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents." *Maher* v. *Roe,* 432 U.S. 464, 469 (1977).

The question arises whether, in conjunction with the administration of non-comprehensive medical assistance programs for indigents, federal or state legislative authorities may permissibly classify publicly-funded abortion services by kind and degree of need so as to prohibit payment for abortions in those instances where the risk of damage to maternal health is minimized and legislatively defined interests in fetal life, childbirth and fiscal autonomy are enhanced.

The decision below appears to be premised on the supremacy of individual medical judgment and opinion when it clashes with, or fails to comprehend, the collective economic and social judgment of the community. It elevates as a criterion of Fourteenth Amendment jurisprudence the amorphous concept of "medical necessity"[6] and scuttles the reasoning in *Maher* that sensitive policy choices in a

6. In the affidavit of Oren Richard Depp, M.D. submitted in support of plaintiffs' motion for summary judgment, the concept is defined as follows: "Where a 1% or higher risk of morbidity or mortality exist, together with a firm wish by the patient to terminate her pregnancy, I would consider an abortion to be medically indicated (or 'medically necessary' or 'therapeutic')." Affidavit of Oren Richard Depp, M.D., ¶ 11, pp. 6-7.

democracy are the province of the legislatures and not the courts.

Based upon the *legal* opinion of plaintiff Zbaraz that P.A. 80-1091 imposes on him an unreasonable standard of "predictive certainty" foreign to the medical profession, the District Court reaches the speculative conclusion that the effect of the Hyde Amendment criteria "will be to increase substantially maternal morbidity and mortality", p. A-36, *infra*. No attempt was made by the District Court to buttress this reasoning by references to the legislative histories and debates surrounding P.A. 80-1091 and the Hyde Amendment. Appellant Quern submits that no such standard of "predictive certainty" can be gleaned from those legislative histories. A fiat disclaimer of plaintiff's legal opinion can be found in comments made by the Secretary of Health, Education and Welfare accompanying the regulations implementing the Hyde Amendment. 43 Fed. Reg. 31876 (July 21, 1978). Taken together these observations, along with plaintiffs' concept of "medical necessity", raise the difficult question of the constitutional rights of private physicians, in furtherance of their own economic interests, to curtail governmental control and discretion of medical assistance programs for the indigent. See, *Association of American Physicians & Surgeons* v. *Weinberger*, 395 F. Supp. 125 (N.D. Ill. 1975), *aff'd.* 423 U.S. 975 (1975).

The legislation at issue rationally furthers important governmental interests which have been legitimated in prior decisions of this Court. The state's interest in fetal life and the encouragement of childbirth were sufficient to overcome constitutional challenges in *Maher* v. *Roe, supra* and its companion case, *Poelker* v. *Doe*, 432 U.S. 519 (1977). That the State has a legitimate interest in fiscal autonomy

finds support in both *Maher* and *Poelker* which in turn derive their strength from *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

In the balance is the "firm desire" of Jane Doe to abort her pregnancy in the face of some measure of risk to her health should she carry the fetus to term and her belief that the constitution compels the state to pay for the exercise of her right to choose to have an abortion prior to fetal viability.

Is the right to choose to abort created in *Roe* a "non-interference right" as suggested in *Maher* or does the factor of some small degree of medical risk alter the equation so as to trigger an obligation of state funding? Once the state decides to fund some of the medical expenses of the indigent must it fund all "medically necessary" abortions as defined by plaintiffs? Does the concept of fetal viability as related to maternal health really strip elected representatives of the people of the power to make controversial policy decisions in the area of economic and social welfare legislation?

Illinois State Senator Lemke, the sponsor of P.A. 80-1091, felt the answer to these questions was "no". As he stated in the debates prior to passage of the statute:

> My people don't want abortions being performed with their money. If it costs them more to support these children after they're born, they will pay that money gladly as long as it's properly used.
> (Memorandum Opinion, p. A33, *infra*.)

Appellant Quern submits that on a proper balancing of the interests involved in the case, this Court will find that the legislation at issue here is constitutional since the classifications made rationally further several important state interests and only minimally affect pregnant indigent women and their treating physicians.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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July, 1979

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 78-1669, 78-1709, 78-1787,
78-1890, 78-1891, 78-2029
DAVID ZBARAZ, et al.,

Plaintiffs-Appellees,

v.

ARTHUR F. QUERN,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 77 C 4522—Alfred Y. Kirkland, *Judge.*

ARGUED NOVEMBER 1, 1978—DECIDED FEBRUARY 13, 1979.

Before CUMMINGS, SPRECHER, and BAUER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This class action was brought under the Civil Rights Act (42 U.S.C. § 1983) to enjoin enforcement of a 1977 Illinois statute withdrawing medical assistance funding in Illinois for all abortions except those "necessary for the preservation of the life of the [pregnant] woman."[1] Plaintiffs do not object to the refusal to fund

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1. Ill. Rev. Stat. Supp. (1977) ch. 23 §§ 5 5, 6-1, 7-1.

purely elective abortions, and challenge the limitation on funding only as to medically necessary abortions. They assert that the Illinois statute denies them and the classes they represent[2] rights guaranteed by Title XIX of the Social Security Act (Medicaid) (42 U.S.C. § 1396 *et seq.*) and by the Fourteenth Amendment to the United States Constitution.

Plaintiffs are two doctors whose practice includes the performance for indigent women of medically necessary abortions, most of which are not necessary for the preservation of their lives; the Chicago Welfare Rights Organization, whose members include women dependent on Illinois medical assistance benefits; and Jane Doe, an indigent woman requiring a medically necessary abortion but one that is not necessary to save her life. The principal defendant is Arthur F. Quern, Director of the Illinois Department of Public Aid, the state agency charged with administering the medical assistance programs and with enforcement of the statute in question. Two other doctors were allowed to intervene as defendants in the court below.

In December 1977 the district court issued an order abstaining from consideration of the case. Plaintiffs appealed

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2. The classes certified by the district court consist of (1) all pregnant women eligible for the Illinois medical assistance programs for whom an abortion is medically necessary but not necessary for the preservation of their lives and who wish such abortion performed, and (2) all Illinois physicians who are certified to obtain reimbursement for necessary medical services rendered to, and who perform medically necessary abortions for, persons eligible for the Illinois medical assistance programs. Because of the injunction granted below, the state resumed its prior medical assistance funding for medically necessary abortions.

and this Court granted them an injunction pending appeal against enforcement of the Illinois statute insofar as it prohibits state funding for therapeutic abortions.[3]

In March 1978 we reversed the district court's abstention order but did not resolve the merits of plaintiffs' motion for a preliminary injunction. *Zbaraz* v. *Quern,* 572 F. 2d 582. Thereafter, the district court held that Title XIX of the Social Security Act and the regulations thereunder require Illinois to provide medical assistance funding for all therapeutic abortions. Judge Kirkland concluded that the Hyde Amendment on which defendants rely does not call for a contrary result.[4] Because the district court resolved the case on statutory grounds, plaintiffs' constitutional challenges were not resolved. The district court permanently enjoined defendants from denying payments under the Illinois medical assistance programs to the plaintiff physicians "and any other recognized and legal medical providers, for the rendition of medical services to indigent pregnant women for therapeutic abortions * * *." This injunction is still in effect.

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3. Our injunction order defined "therapeutic" as "medically necessary or medically indicated according to the professional medical judgment of a licensed physician in Illinois, exercised in light of all factors affecting a woman's health." The district court employed this definition in its final judgment now here on appeal.

4. The Hyde Amendment (quoted *infra*) was first enacted as a rider to the FY 1977 Health, Education and Welfare appropriations bill. (Section 209 of Pub. L. 95-205; 91 Stat. 1460 Dec. 9, 1977).

This opinion starts with a caveat. This panel is interpreting Congressional and Illinois General Assembly laws as they are written. Our line of duty is to construe those laws, neither to condone nor criticize them. Moreover, we do not start with a clean slate, for six years ago the Supreme Court under the Due Process clause of the Fourteenth Amendment invalidated penal laws that restrict legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother." *Roe* v. *Wade,* 410 U.S. 113, 164. Very recently the Supreme Court reaffirmed that the right to secure an abortion in the early stages of pregnancy is a fundamental right. It also stressed that the abortion decision is primarily a medical one and emphasized the central role of the physician in helping to reach that decision. *Colautti* v. *Franklin,* —— U.S. ——, 47 LW 4094. With those admonitions in mind, our task is readily charted.

The Court of Appeals for the First Circuit has recently ruled on a challenge to the Massachusetts abortion funding law that is nearly identical to the challenge mounted here to the similar Illinois law. *Preterm, Inc.* v. *Dukakis,* —— F. 2d —— (1st Circuit, Nos. 78-1324, 78-1325, and 78-1326, decided January 15, 1979). We agree with Judge Coffin's majority opinion in that case.[5]

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5. Two other courts have also recently handed down opinions in similar cases. In *Roe* v. *Casey* (E.D. Pa., decided December 21, 1978, 47 L.W. 2461) the district court held that a state could not exclude medically necessary abortions as a category of care funded under Medicaid. It is not clear from the abbreviated report whether the court intended that the state pay for abortions which are medically necessary but not funded under the Hyde Amendment.

In *Frieman* v. *Walsh* (W.D. Mo. No. 77-4171-CV-C, decided January 26, 1979), the court similarly held that a

(Footnote continued on next page)

The First Circuit held in *Preterm* that Title XIX of the Social Security Act does not require funding of all medical care which is deemed "necessary" by the treating physician, but that it does prohibit a state from singling out medically necessary abortions as a category of care which would be funded only under certain narrow circumstances. The *Preterm* court concluded that for a state so to discriminate in the care it provided would conflict with the statutory provision that state-established standards for determining the extent of medical assistance should be "reasonable" and "consistent with the objectives" of the Medicaid Act. 42 U.S.C. § 1396a(a)(17). These objectives include furnishing medical assistance "to meet the costs of necessary medical services." 42 U.S.C. § 1396. In addition, the regulations promulgated pursuant to Title XIX provide that "the State may not arbitrarily deny or reduce the amount, duration, or scope of, such services to an otherwise eligible individual solely because of the diagnosis, type of illness or condition." 45 C.F.R. § 449.10(a)(5)(i).

We agree with the conclusion of the court in *Preterm* that limiting Medicaid assistance to life-threatening abortions "violate[s] the purposes of the Act and discriminate[s] in

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(Footnote continued from preceding page)

state could not discriminate against funding medically necessary abortions under Medicaid. It did not reach the question whether the Hyde Amendment modified Title XIX, but held that even viewed as an appropriations measure, it relieved the states of the obligation of funding non-Hyde Amendment abortions because under Title XIX the states are obligated only to fund those procedures for which they will be reimbursed by the federal government.

a proscribed fashion'' (slip op. 9).[6] See also *White* v. *Beal*, 555 F. 2d 1146 (3d Cir. 1977); *Rush* v. *Parham*, 440 F. Supp. 383, 390-391 (N.D. Ga. 1977). The First Circuit was unanimous that the Medicaid Act requires participating states to provide "medically necessary'' abortions under their plans. Judge Bownes' point of disagreement with the majority was that in his view the Hyde Amendment does not permit participating states to limit necessary medical services for abortion to those set forth in that amendment. However, we agree with the conclusion of the majority in *Preterm* that the Hyde Amendment alters Title XIX in such a way as to allow states to limit funding to the categories of abortions specified in that amendment.

The Hyde Amendment is a provision which has been enacted in varying forms into the appropriations bills funding the Department of Health, Education and Welfare and the Labor Department for fiscal years 1977, 1978 and 1979. The fiscal 1978 and 1979 versions of it provide:

> "None of the funds contained in this Act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest have been reported promptly to a law enforcement agency or public health service, or except in those instances where severe and long-lasting physical health

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6. The Massachusetts law at issue in *Preterm* limited funding to abortions "necessary to prevent the death of the mother'' and to procedures "necessary for the proper treatment of the victims of forced rape or incest." (Slip op. 2.) That Massachusetts law is similar to but somewhat more liberal than the Illinois statute here at issue, which provides funding only when an abortion is "necessary for the preservation of the life of the woman."

> damage to the mother would result if the pregnancy were carried to term when so determined by two physicians." (See note 4 *supra*.)

Since, like the First Circuit, we have held that Title XIX prohibits discrimination in funding based on type of condition, the Hyde Amendment by singling out abortions for funding under only certain narrowly defined circumstances is in conflict with the substantive provisions of the Medicaid Act. It therefore becomes necessary to determine whether the Hyde Amendment was intended to amend the provisions of Title XIX or merely to prohibit the expenditure of federal funds. Under the latter interpretation, the states would be obligated to provide for medically necessary abortions for which federal funds would not be available.[7]

As indicated, we agree with Judge Coffin's opinion in *Preterm* and conclude that the Hyde Amendment did amend Title XIX. We are most reluctant to conclude that Congress has used an appropriations measure to effect such a change in the law, both because this reading enhances the likelihood of confusing and disruptive annual changes in the substantive law and because the Supreme Court has recently disapproved of so interpreting an appropriations bill.

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7. The Hyde Amendment clearly mandates abortion funding in two categories of cases not covered by the Illinois law—cases of promptly reported rape or incest, and cases in which severe and long-lasting damage to the mother's physical health would result from continuing the pregnancy. Illinois is required to fund abortions falling into these categories under its Medicaid plan and is entitled to the usual federal reimbursement. The remaining question is whether Illinois must pursuant to Title XIX provide at its own expense abortions which are medically necessary but which do not qualify for federal reimbursement under the Hyde Amendment.

Tennessee Valley Authority v. *Hill*, —— U.S. ——, 46 LW 4673.

The Hyde Amendment on its face refers only to the use of federal funds. The plaintiffs have asserted that the language of the Hyde Amendment itself appears clear, so that it is—theoretically at least—unnecessary to consult the legislative history. As the preceding discussion indicates, however, what the states are required to do to comply with the requirements of Title XIX is not easily determined. Although we have concluded that the states may not exclude from coverage a whole category of medically necessary care, that conclusion is not necessarily obvious from the face of any single provision of the Medicaid Act. Because not all of the obligations of the states are clearly spelled out in that statute and because those obligations arise in the context of a plan for sharing expenses between the federal and state government,[8] it becomes appropriate to consult the legislative history of the Hyde Amendment to see what impact its provisions were intended to have on the substantive obligations of the participating states.

A fair-minded reading of the lengthy and often highly emotional floor debates in both houses of Congress during the yearly considerations of the Hyde Amendment compels the conclusion that Congress intended through this vehicle to alter the scope of Title XIX in regard to abortions. As the majority opinion in *Preterm* noted, a few Congressmen and Senators said that the amendment would simply restrict federal funds for abortions.[9] In context, however,

8. 42 U.S.C. § 1396b sets out the basic scheme for partial federal reimbursement of state expenditures under Medicaid.

9. Some of these comments appear at 123 Cong. Rec. H. 6086, 6090 (June 17, 1977); 123 Cong. Rec. H. 10826-10830 (Oct. 12, 1977); 123 Cong. Rec. S. 11039 (June 29, 1977).

even these remarks were apparently intended to distinguish between a prohibition on abortions (which would be unconstitutional under *Roe* v. *Wade, supra*), and a mere refusal to fund abortions. They do not appear to have been intended to suggest that state — but not federal — funds would be available. Moreover no one, whether supporting or opposing the Hyde Amendment, ever suggested that state funding would be required. To the contrary, the assumption was that when federal funds were withdrawn, the states, although free to continue to pay for abortions not falling within the parameters of the Hyde Amendment, would refuse to do so.[10]

In addition, a frequently reiterated belief was that taxpayers ought not to be compelled by the federal government to finance abortions which were repugnant to them on religious or moral grounds.[11] This concern would apply with at least equal force if the tax expenditures required by federal law came from the state rather than the federal treasury. Nor is there any suggestion in the Congressional debates that the Hyde Amendment would alter the basic

10. Comments revealing that assumption appear throughout the debates, but a sample of them can be found at 123 Cong. Rec. H. 6085 (Rep. Bauman); *id.* at 6086 (Rep. Stokes); *id.* at 6088 (Rep. Eckhardt); *id.* at 6089 (Reps. Fenwick and Spellman); *id.* at 6092 (Rep. Holtzman); *id.* at 6093 (Reps. Weiss and Allen) (June 17, 1977); 123 Cong. Rec. H. 10968 (Rep. Sears) (Oct. 13, 1977); 123 Cong. Rec. S. 18583-84 (Sen. Bayh); *id.* at 18589 (Sen. Packwood) (Nov. 3, 1977); 123 Cong. Rec. S. 13672 (Sen. Brooke) (Aug. 4, 1977); 123 Cong. Rec. S. 11040 (Sen. McGovern) (June 29, 1977).

11. Samples of these remarks appear at 123 Cong. Rec. H. 6085 (Rep. Obey); *id.* at 6088 (Rep. Rudd); *id.* at 6089 (Rep. Young) (June 17, 1977); 123 Cong. Rec. H. 10835 (Rep. Early) (Oct. 12, 1977); 123 Cong. Rec. S. 18584-18585 (Sen. Helms) (Nov. 3, 1977).

scheme of federal-state sharing of Medicaid expenses.[12] It is also clear that Congress was aware that its action could be construed as legislation via an appropriations bill,[13] and that this was not the preferred method of procedure.[14]

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12. Plaintiffs have correctly noted that Medicaid and related statutes sometimes do require state expenditures unmatched by federal funds (Br. at 63-64, note). We have no doubt of Congress' authority to condition its expenditure of Medicaid funds on the states' expenditure of funds for related purposes. However, as plaintiffs' examples indicate, when Congress has imposed such conditions, it has done so explicitly and for the apparent purpose of encouraging the states to undertake programs Congress deemed to be desirable. Not only did Congress not explicitly shift the funding obligation to the states in the Hyde Amendment, but it also clearly did not intend to encourage abortions.

13. We do not rely on the fact that both the House and the Senate waived their rules against legislating in an appropriations bill (House Rule XXI(2); Standing Rules of the Senate, Rule 16.4) in concluding that the Hyde Amendment worked a substantive change in the law. Apparently both houses of Congress interpret those rules to mean that while a limitation of expenditures would be acceptable, any provision which imposed a duty on federal officials would go beyond a limitation and run afoul of the rules. See 123 Cong. Rec. H. 6082 (June 17, 1977). Because ascertaining when the conditions of the Hyde Amendment would be fulfilled was interpreted to impose additional duties on federal officials, only a flat ban on the use of funds for abortions was construed to be within the rules. It was in order to allow federal funds for abortions in certain limited circumstances that the rules were waived. Since a flat ban on abortion funding, although evidently within the procedural rules, would nevertheless conflict with our interpretation of Title XIX, the fact that the rules were waived, although relied upon by the defendants, is not helpful.

14. Early in the debate on the fiscal 1978 appropriations, Congressman Hyde spoke as follows:

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Finally, the circumstances under which the Hyde Amendment was passed distinguish it from *Tennessee Valley Authority* v. *Hill, supra.* The problems the Supreme Court faced when asked to construe the appropriations for the TVA budget, including the Tellico Dam, as effecting a *pro tanto* repeal of the Endangered Species Act do not exist here. Unlike the situation in the *Hill* case, there is no quesiton here that Congress as a body was well aware of the implications of the Hyde Amendment and agreed to them. More importantly, *Hill* involved the question of when expenditures authorized under one Act should be interpreted to repeal the substantive provisions of an entirely inde-

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> "Yesterday, remarks were made that it is unfortunate to burden an appropriation bill with complex issues, such as busing, abortion and the like. I certainly agree that it is very unfortunate. The problem is that there is no other vehicle that reaches this floor in which these complex issues can be involved. Constitutional amendments which prohibit abortions stay languishing in subcommittee, much less committee, and so the only vehicle where the Members may work their will, unfortunately, is an appropriation bill. I regret that. I certainly would like to prevent, if I could legally, anybody having an abortion, a rich woman, a middle-class woman, or a poor woman. Unfortunately, the only vehicle available is the HEW medicaid bill. A life is a life. The life of a little ghetto kid is just as important as the life of a rich person. And so we proceed in this bill."

123 Cong. Rec. H. 6083 (June 17, 1977). Subsequently, numerous other Congressmen and Senators, both opponents and proponents of the bill, indicated awareness that the amendment would have a substantive impact. See *e.g.,* 123 Cong. Rec. H. 6088 (Rep. Eckhardt); *id.* at 6090 (Rep. Mazzoli); *id.* at 6097 (Rep. Meyner) (June 17, 1977); 123 Cong. Rec. S. 11035 (Sen. Brooke) (June 29, 1977); 123 Cong. Rec. S. 19440, 19441 (Sen. Magnuson); *id.* at 19443 (Sen. Javits); *id.* at 19445 (Sen. Stennis) (Dec. 7, 1977).

pendent Act.[15] Here, in contrast, not only was the appropriations measure geared specifically to the substantive provisions of the affected Act, but the amendment was in the form of limiting previously authorized expenditures rather than authorizing arguably prohibited expenditures, as in *Hill*.

Under these circumstances, mindful that "[t]he doctrine disfavoring repeals * * * applies with even *greater* force when the claimed repeal rests solely upon an appropriations act,'"[16] we are nonetheless convinced by the overwhelming weight of the legislative history that Congress did intend to alter the substantive requirements of Title XIX by passing the Hyde Amendment.[17] Therefore Illinois is not re-

15. As the Supreme Court noted, implying such a repeal could wreak havoc with the legislative process.

> "When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure."

Tennessee Valley Authority v. *Hill*, —— U.S. at ——, 46 LW at 4683.

16. *Tennessee Valley Authority* v. *Hill*, —— U.S. at ——, 46 LW at 4683.

17. It is established that Congress has the power to legislate substantively in an appropriations Act. *United States* v. *Dickerson*, 310 U.S. 554. Moreover, when as here the substantive change is a prohibition against the use of funds for previously authorized purposes, the courts have been less hostile to modifications via appropriations bills. *Eisenberg* v. *Corning*, 179 F. 2d 275, 276 (D.C. Cir. 1949); *Friends of the Earth* v. *Armstrong*, 485 F. 2d 1, 9 (10th Cir. 1973), certiorari denied, 414 U.S. 1171; *City of Los Angeles* v. *Adams*, 556 F. 2d 40, 48-49 (D.C. Cir. 1977).

quired by Title XIX to fund abortions other than those covered by the Hyde Amendment.

As noted, the district court did not reach the constitutional arguments raised by the parties because it had statutory grounds for its decision. Because the constitutional issues were not considered below, and in light of the fact that our interpretation of the Hyde Amendment to modify the requirements of Title XIX may alter the constitutional considerations, it would be inappropriate for us to pass on them now. The parties should have a full opportunity to develop their positions and the district court to rule on them. *Singleton* v. *Wulff*, 428 U.S. 106, 120. Therefore, we remand the case for expedited consideration of the constitutional questions that remain open. This consideration should include, *inter alia*, whether the Hyde Amendment, by limiting funding for abortions to certain circumstances[18] even if such abortions are medically necessary, violates the Fifth Amendment in view of the facts that no other category of medically necessary care is subject to such constraints and that abortion has been recognized as a fundamental right. *Roe* v. *Wade*, *supra*.

On remand, the permanent injunction granted by the district court must be modified forthwith to require defendants to grant payments to plaintiff physicians and other recognized and legal medical providers for the rendition of medi-

18. The constraints imposed by the Hyde Amendment on medically necessary abortions which are not imposed on other kinds of medically necessary care include (1) a greater degree of potential harm from withholding treatment (the threatened damage in the case of an abortion must be "severe and long-lasting"), (2) the threatened harm must be physical, and (3) two doctors must make the determination of likely harm.

cal services to indigent pregnant women for those abortions fundable under the Hyde Amendment. The defendants have pointed out that the challenged Illinois law applies to medical care under fully state-funded plans as well as under Medicaid (Ill. Rev. Stat. ch. 23 §§ 6-1 and 7-1; General Assistance and Local Aid to the Medically Indigent, respectively). Therefore, they assert, since the Illinois statute has so far been determined only to contravene Title XIX as altered by the Hyde Amendment, enforcement of the Illinois statute should not be enjoined as it applies to purely state-funded plans. The plaintiffs urge us to find the statute non-severable, so that its application to purely state-funded plans falls with the federally funded portion.[19]

This presents a close question that necessitates interpreting what the Illinois General Assembly would likely have done had it been able to forsee the development of this case. [20] In a similar situation the Illinois Supreme Court has held a law non-severable (*Sperling* v. *County Officers Electoral Board,* 57 Ill. 2d 81 (1974), whereas in others it has not (*Vissering Mercantile Co.* v. *Annunzio,* 1 Ill. 2d 108 (1953); *People ex rel. Engle* v. *Kerner,* 32 Ill. 2d 212

19. The defendants suggest that we should not consider the severability issue since the district court did not articulate this ground for its decision. However, we may affirm a district court's ruling which is correct as a matter of law even though the proper ground was not expressed. Therefore cases cited by defendants to the effect that an appellate court will not consider a ground for reversal which was not presented to the district court are inapposite.

20. The Illinois Supreme Court has formulated the test for severability of provisions of a law as whether "it can be said that the General Assembly would not have passed the statute with the invalid portion eliminated." *People* ex rel. *Engle* v. *Kerner,* 32 Ill. 2d 212, 221-222 (1965).

(1965)). We have been told that the vast majority of publicly funded abortions would come under the Medicaid plan rather than the purely state plans. In these circumstances, it is not at all clear that the General Assembly would have imposed standards for funding from state plans which differ from the standards for Medicaid funding. The defendant State's official has informed us that the Illinois law "represents Illinois' understanding of Congressional purpose as reflected in the Hyde Amendments to federal welfare appropriations and the Supreme Court's delineation of the nature and extent of the qualified 'right' to abortion vis-a-vis the public funding issue * * *" (Br. 9).[21] Since the State itself has tied the challenged statute to the proper interpretation of what is required by Title XIX, evidently it intended that recipients of purely state funds be treated consistently with those who receive Medicaid funds.

In light of this history of the challenged law, and in view of the fact that the resolution of the constitutional issues will apply equally to the state-funded and the Medicaid-funded plans,[22] we conclude that the various provisions of the law should not be severed and that the modified injunction should apply to all publicly funded abortions.

21. When the Illinois law was passed, the version of the Hyde Amendment then in effect (fiscal year 1977) provided funds for abortions only when the life of the mother was endangered.

22. If the Hyde Amendment is determined to violate the guarantee of equal protection as it inheres in the Due Process clause of the Fifth Amendment, it appears likely that similar state action would violate the Fourteenth Amendment.

Vacated and remanded for further proceedings consistent herewith.[23]

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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23. Our mandate shall issue this day.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Presiding Judge, Honorable ALFRED Y. KIRKLAND.

Cause No. 77 C 4522.

Date—February 15, 1979.

Title of Cause—DAVID ZBARAZ, M.D., et al. v. ARTHUR F. QUERN.

Brief Statement of Motion—Mandate of the United States Court of Appeals for the Seventh Circuit.

Pursuant to the mandate of the Court of Appeals for the Seventh Circuit contained in its Judgment and Opinion of February 13, 1979, this Court hereby modifies its permanent injunction entered on May 15, 1978 to provide:

This Court hereby orders that defendant be permanently enjoined from:

(1) enforcing Ill. Rev. Stat. Supp. (1977) ch. 23, §§ 5-5, 6-1, 7-1 to deny payments under the Illinois medical assistance programs to plaintiffs Zbaraz, Motew, and any other recognized and legal medical providers, for the rendition of medical services to indigent pregnant women for: (a) abortions when the life of the mother would be endangered if the fetus were carried to term; (b) such medical procedures necessary for the victims of rape or incest, when such rape or incest have been reported promptly to a law enforcement agency or public health service; and (c) abortions in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians, or to deny such payments on behalf of any such indigent pregnant women for such abortions; (2) directing notice to any recognized and legal med-

ical providers, or to persons receiving assistance under the Illinois medical assistance programs, that the abortions and medical procedures described in ¶(1) are not, or will not be, a covered (reimbursable) service under the Illinois medical assistance programs.

The remainder of the permanent injunction of May 15, 1978 and the definitions contained therein remain in full force and effect with the exception of ¶ (d) [containing the definition of "therapeutic"] which is hereby deleted.

The parties are to appear for a status hearing at 9:30 a.m. on February 22, 1979 at which time procedures will be developed to enable expedited consideration of the constitutional questions which remain before this Court as a result of the judgment and opinion of the Seventh Circuit entered herein.

Alfred Y. Kirkland.

Alfred Y. Kirkland.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Presiding Judge, Honorable ALFRED Y. KIRKLAND.

Cause No. 77 C 4522.

Date—February 22, 1979.

Title of Cause—DAVID ZBARAZ, M.D., et al. v. ARTHUR F. QUERN, et al.

Brief Statement of Motion—Certification to the Attorney General of the United States pursuant to 28 U.S.C. § 403(a).

Pursuant to 28 U.S.C. § 2403(a), this Court hereby certifies to the Attorney General of the United States that the constitutionality of an Act of Congress (specifically the fiscal years 1978 and 1979 version of the so-called "Hyde Amendment" first enacted as a rider to Fiscal Year 1977 Health, Education and Welfare appropriations bill [Section 209 of Pub. L. 95-205, 91 Stat. 1460 Dec. 9, 1977]) affecting the public interest is drawn into question in this lawsuit. The Attorney General is directed to notify this Court by March 8, 1979 whether the United States intends to seek permission to intervene herein for presentation of evidence and for argument on the question of constitutionality.

Alfred Y. Kirkland.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Presiding Judge, Honorable ALFRED Y. KIRKLAND.

Cause No. 77 C 4522.

Date—March 8, 1979.

Title of Cause—DAVID ZBARAZ, M.D., et al. v. ARTHUR F. QUERN.

Brief Statement of Motion—Request of the United States for Permission to Intervene Pursuant to 28 U.S.C. § 2403(a) [contained in the letter of March 7, 1979] and revised briefing schedule on remaining issues.

The request of the United States for permission to intervene pursuant to 28 U.S.C. § 2403(a) [contained in a letter to this Court from Assistant Attorney General Babcock dated March 7, 1979] is granted.

Pursuant to the agreement of the parties, the simultaneous briefing schedule concerning the remaining constitutional issues in this case contained in this Court's Order of February 22, 1979 is hereby revised as follows:

> The parties are to submit briefs in support of their positions on the constitutional issues remaining by March 22, 1979; the parties are to file reply briefs to the briefs filed by opposing parties by March 29, 1979. The United States is subject to this briefing schedule. Filing of these reply briefs will conclude the briefing on these issues and this Court will give expedited consideration to these issues and will make any rulings necessary concerning these issues within a short period of time thereafter.

The time limits contained in this briefing schedule will be strictly enforced by this Court.

Alfred Y. Kirkland.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID ZBARAZ, M.D., et al.,
Plaintiffs,
vs.
ARTHUR F. QUERN, etc.,
Defendant.
No. 77 C 4522

MEMORANDUM OPINION

Plaintiffs brought this class action[1] under 42 U.S.C. Section 1983 to enjoin enforcement of a 1977 Illinois statute withdrawing medical assistance funding for all abortions except those "necessary for the preservation of the life of the pregnant woman." P.A. 80-1091, Ill. Rev. Stat. Supp. (1977) ch. 23, Sections 5-5, 6-1, 7-1.[2] Plaintiffs are two doc-

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1. The classes certified by the district court consist of (1) all pregnant women eligible for the Illinois medical assistance programs for whom an abortion is medically necessary but not necessary for the preservation of their lives and who wish such abortion performed, and (2) all Illinois physicians who are certified to obtain reimbursement for necessary medical services rendered to, and who perform medically necessary abortions for, persons eligible for the Illinois medical assistance programs.

2. Those sections provide, in relevant part:

Section 5-5. The Illinois Department, by rule, shall determine the quantity and quality of the medical assistance for which payment will be authorized, and the

(Footnote continued on next page)

tors who perform medically necessary, but not necessarily life-preserving abortions for indigent women; the Chicago Welfare Rights Organization, whose members include women dependent on Illinois medical assistance benefits; and Jane Doe, an indigent woman for whom an abortion is medically necessary but not necessary for the preservation

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(Footnote continued from preceding page)

> medical services to be provided, which may include all or part of the following: . . . but not including abortions, or induced miscarriages or premature births, unless, in the opinion of the physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.
>
> Section 6-1. Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.
>
> Section 7-1. Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care, . . . except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a viable child and such procedure is necessary for the health of the mother or her unborn child.

of her life. Defendant Arthur Quern is the Director of the Illinois Department of Public Aid, the state agency responsible for administering Illinois medical assistance programs. Intervenor-defendants include two doctors and the United States.

The complaint alleged that P.A. 80-1091 violated plaintiffs' rights under the Social Security Act, 42 U.S.C. Section 1396 et seq., and the Ninth and Fourteenth Amendments to the United States Constitution. Plaintiffs sought both declaratory and injunctive relief. The case was originally assigned to Judge Kirkland. On December 21, 1977, he ordered the proceedings stayed pending an interpretation of P.A. 80-1091 by an Illinois state court. Reasoning that the Illinois statute could be construed to be consistent with the Social Security Act, Judge Kirkland decided the exercise of federal jurisdiction at the time would be imprudent. He therefore merely entered and continued plaintiffs' motion for preliminary relief. (Memorandum Opinion and Order of December 21, 1977, at 3-5).

Plaintiffs appealed and the Seventh Circuit reversed. *Zbaraz* v. *Quern,* 572 F. 2d 582 (7th Cir. 1978). In its ruling, the Court of Appeals declined to decide the merits of plaintiffs' motion for a temporary restraining order and/or preliminary injunction. Instead, the court remanded the case to the district court for expeditious consideration of the question of preliminary relief.

On remand, Judge Kirkland held that by failing to cover "medically necessary" abortions, P.A. 80-1091 violated the Social Security Act and its implementing regulations. The court reasoned that Illinois' funding of only "life-preserving" abortions fell short of its responsibilities under Title XIX to establish "reasonable standards . . . for determining . . . the extent of medical assistance under the plans which . . . are consistent with the objectives of [the Medi-

caid program]," 42 U.S.C. Section 1396(a)(17). The court noted that the prime objective of Medicaid is to "furnish medical assistance [to eligible persons] to meet the costs of necessary medical services." 42 U.S.C. Section 1396. (Memorandum Opinion of May 15, 1978, at 8-11).

In his decision, Judge Kirkland also considered the impact of the Hyde Amendment on a state's responsibilities under Title XIX. The Hyde Amendment, first enacted as a rider to the 1977 fiscal year budget for the Department of Health, Education and Welfare, provides:

> None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Section 210 of Pub. L. 95-480; 92 Stat. 1586, Oct. 18, 1978. Judge Kirkland interpreted the Hyde Amendment as a prohibition on the use of federal funds rather than a substantive amendment to the Social Security Act. A state's obligations under Title XIX to fund medically necessary abortions, Judge Kirkland thus concluded, survived passage of the Hyde Amendment. Judge Kirkland issued a permanent injunction restraining defendants from enforcing P.A. 80-1091 to deny payments under the Illinois medical assistance programs for therapeutic abortions. (Memorandum Opinion of May 15, 1978, at 11-12).

Defendants appealed and again the Seventh Circuit reversed. *Zbaraz* v. *Quern*, —— F. 2d ——, No. 78-1669, February 13, 1979. Following the lead of the First Circuit

Court of Appeals in *Preterm, Inc.* v. *Dukakis*, —— F. 2d —— (1st Cir. Nos. 78-1324, 78-1325, and 78-1326, decided January 15, 1979), the court held that the Hyde Amendment, by singling out abortions as a category of care which would be funded only under certain narrow circumstances, conflicted unavoidably with Title XIX. Despite its seemingly unambiguous language and its location in an appropriations measure, therefore, the Seventh Circuit concluded that the Hyde Amendment was not just a limitation on the use of federal funds, but an amendment to Title XIX as well. (Slip Op. at 6). Since the Amendment removed all but a narrow category of abortions from Medicaid coverage, it effectively permitted states also to withhold funds from non-Hyde Amendment abortions. (Slip Op. at 10)

The Court of Appeals recognized the constitutional questions raised by its holding[3] and remanded the case to the

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3. The Seventh Circuit included in its mandate a directive to pass on the constitutionality of the Hyde Amendment, even though plaintiffs attack only the legality of an Illinois statute. After remand, therefore, the United States was permitted to intervene pursuant to 28 U.S.C. Section 2403(a). In its brief in support of the Hyde Amendment, the United States suggested that the Seventh Circuit "viewed the federal and state legislation as inextricably intertwined." (Brief for the United States, at 4). Although we are not persuaded that the federal and state enactments are inseparable and would hesitate to inject into the proceeding the issue of the constitutionality of a law not directly under attack by plaintiffs, we are obviously constrained to obey the Seventh Circuit's mandate. Therefore, while our discussion of the constitutional questions will address only the Illinois statute, the same analysis applies to the Hyde Amendment and the relief

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district court which directions to modify the permanent injunction and to decide the constitutional questions.[4] (Slip Op. at 11).

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granted will encompass both laws. We note that although the Fifth Amendment does not contain an express Equal Protection Clause, its Due Process Clause has been construed to incorporate equal protection guarantees. *Weinberger* v. *Salfi*, 422 U.S. 749, 770 (1975); *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971).

4. The Seventh Circuit instructed the district court to determine whether the withholding of funds for "medically necessary" abortions violated the constitution. (Slip Op. at 11). Prior to P.A. 80-1091, Illinois funded "therapeutic" abortions, defined as "medically necessary or medically indicated according to the professional medical judgment of a licensed physician in Illinois, exercised in light of all factors affecting a woman's health." State of Illinois Dept. of Public Aid —Medical Assistance Program Handbook for Physicians, January, 1976, A-204. The Seventh Circuit adopted this definition of "therapeutic" without addressing the question of whether it was broader than "medically necessary." Judge Kirkland treated the two as synonymous. (See Order of May 15, 1978, at 10). Whether the terms "medically necessary" and "therapeutic" are coextensive is a question that is not merely of academic significance. If, by attacking the constitutionality of P.A. 80-1091, plaintiffs are advocating a return to the status quo ante, then presumably a decision in their favor would result in the funding of all "therapeutic" abortions. But as we read the complaint, plaintiffs seek funding for "medically necessary" abortions, whether or not that is broad enough to include

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Pursuant to the Seventh Circuit's mandate, Judge Kirkland modified his permanent injunction to require Illinois to fund under its medical assistance programs abortions which fall within the scope of the Hyde Amendment exceptions. (Minute Order entered February 15, 1979). Judge Kirkland set a briefing schedule, but then determined that for medical reasons he would be unable to give the case the "expeditious consideration" ordered by the Seventh Circuit. The case was reassigned to us on April 18, 1979.

Now pending are the parties' cross-motions for summary judgment and plaintiffs' motion for a temporary restraining order. The latter motion is a response by plaintiffs to the announced intention of the Illinois Department of Public Aid to deny reimbursements for all abortions except those which it is required to fund by Judge Kirkland's modified injunction—that is, abortions still covered under the Hyde Amendment—beginning May 1. For the reasons which follow, we will grant partial summary judgment for both plaintiffs and defendants.

Although plaintiffs raised a number of constitutional issues in their complaint,[5] their principal argument is that,

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all "therapeutic" abortions. This reading harmonizes with plaintiffs' theory of the case—that by funding "medically necessary" operations other than abortions, Illinois is denying plaintiffs equal protection of the laws. Accordingly, we will treat the action as an attack on Illinois' failure to fund "medically necessary" abortions.

5. Plaintiffs also alleged that P.A. 80-1091 violated the Establishment and Free Exercise Clauses of the First Amendment to the Constitution made applicable to the states by the Fourteenth Amendment, and the

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by imposing restrictions on the public funding of medically necessary abortions which are not imposed on other medically necessary operations, P.A. 80-1091 violates their rights to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.[6] The framework for analyzing claims of alleged deprivations of equal protection is now well-established:

> We must decide, first, whether [the statute] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the [legislative] scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination. . . .

San Antonio School District v. *Rodriguez,* 411 U.S. 1, 17 (1973).

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Due Process Clause of the Fourteenth Amendment. (Complaint, par. 22(d)). Plaintiffs' due process claim rests on their argument that the statute disrupts "the carefully constructed balance of constitutional interests Wade and its progency established." (Memorandum in Support of Motion for Summary Judgment, at 22). We believe this contention is subsumed under their equal protection challenge, and we will not treat it separately in this opinion.

6. Plaintiffs have also challenged as unconstitutional the reporting requirement for rape victims. None of the plaintiffs, however, have asserted any personal stake in the determination of this issue. Where, as here, a statute contains separable provisions, a person may challenge only those provisions which operate to injure him, and may not challenge those provisions that cause him no harm. *See Bell* v. *Hongisto,* 501 F. 2d 346 (9th Cir. 1974), *cert. denied* 420 U.S. 962 (1975).

Relying on *Roe* v. *Wade,* 410 U.S. 113 (1973) and subsequent abortion decisions, plaintiffs contend that strict judicial scrutiny is appropriate here because a fundamental right is implicated. In *Roe,* the Supreme Court struck down a Texas statute that made criminal the performance or procurement of an abortion unnecessary to save a mother's life. The Texas legislation was constitutionally infirm, the Court held, because for every stage of a woman's pregnancy, it subordinated the woman's right to privacy, a right which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," to the state's interests in preserving maternal health and promoting fetal life. 410 U.S. at 153. The Court emphasized, however, that although the right of personal privacy "includes the abortion decision . . . this right is not unqualified and must be considered against important state interests in regulation." 410 U.S. at 154. *See also, Doe* v. *Bolton,* 410 U.S. 179, 189 (1973).

Thus, the right recognized in *Roe* is not an affirmative right to an abortion, but is simply a right to make and effectuate the abortion decision, at least in the first trimester of pregnancy, free from governmental regulation. During the second trimester, a state may restrict the effectuation of that decision only in a manner that reasonably promotes the health of the mother. After the fetus has achieved viability, a state may constitutionally proscribe abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 410 U.S. at 164, 165.

Plaintiffs argue here that by erecting a "substantial impediment to poor women's obtaining medically necessary abortions," P.A. 80-1091 restricts the effectuation of their decision to "bear or beget a child," and thereby triggers strict scrutiny. We believe this argument has been explicitly

rejected by the United States Supreme Court in *Maher* v. *Roe,* 432 U.S. 464, 470 (1977), and is therefore foreclosed to plaintiffs here. In *Maher,* the Supreme Court held that the Constitution does not require a state participating in Social Security to pay for nontherapeutic abortions although it pays the expenses of childbirth. Plaintiffs in *Maher* argued that the Connecticut medical assistance scheme infringed upon their fundamental rights as announced in *Roe* v. *Wade.* Rejecting this contention, the Court observed:

> [Roe] implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion and to implement that judgment by the allocation of public funds.
>
> * * * * *
>
> The indigency that may make it difficult—and in some cases, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.
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> * * * * *
>
> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.

432 U.S. at 474, 475.

As in *Maher,* plaintiffs here will encounter difficulty effectuating their decision to terminate a pregnancy not because of any state regulation, but because of their indigency. *Maher* compels the conclusion, therefore, that P.A. 80-1091 impinges upon no fundamental right and should not be subjected to strict judicial scrutiny.[7]

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7. Plaintiffs apparently do not argue that P.A. 80-1091 creates a "suspect classification." This argument

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In further support of their argument that strict scrutiny is appropriate here, plaintiffs analogize to the case of *Shapiro* v. *Thompson,* 394 U.S. 618 (1969). There the Supreme Court declared unconstitutional various state statutory provisions which denied welfare assistance to persons who had not satisfied one year residency requirements, but who were otherwise eligible for welfare benefits. The Court reasoned that by treating indigents who had resided in the state less than a year differently from those who had satisfied the residency requirement, the state was penalizing indigents' rights to migrate, or travel interstate. Since the right to travel interstate was deemed "fundamental," the Court subjected the statutes to strict scrutiny. Finding no compeling justification for treating one year residents differently, the Court concluded that the statutes were unconstitutional. The Court noted that if the purpose of the provisions was to deter migration, or prevent an influx of indigents seeking higher welfare benefits, those purposes were "constitutionally impermissible." 394 U.S. at 631.

In this case, plaintiffs contend that Illinois is penalizing indigent women who desire to exercise their right to effectuate the abortion decision, We believe that again *Maher* disposes of this argument. As the *Maher* Court observed:

> [T]he claim here is that the State "penalizes" the women's decision to have an abortion by refusing to pay for it. Shapiro and Maricopa County did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers. We find no support in the right-to-

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would also be unavailing under *Maher.* There the Supreme Court stated that, "This Court has never held that financial need alone identifies a suspect class for purposes of Equal Protection." 432 U.S. at 470.

> travel cases for the view that Connecticut must show a compelling interest for its decision not to fund elective abortions.

432 U.S. n. 8 at 475. Since there is no fundamental right to a publicly funded abortion, the analogy to *Shapiro* fails, "penalty analysis" does not apply, and strict scrutiny is unnecessary.

Our determination that P.A. 80-1091 should not be subjected to strict judicial scrutiny, however, does not resolve the question of the statute's constitutionality. Whenever a statute treats different classes of individuals differently, that legislative line-drawing is properly the subject of judicial examination. *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 17 (1973). Here, since indigent women in medical need of abortions are treated differently than indigent women in medical need of other surgical procedures, we must subject the statute to the rational relationship test. Under this test, the statute passes constitutional muster only if we can conclude that the legislative classification rationally furthers some legitimate, articulated state purpose. *Id.* As the Supreme Court observed in *Maher,* in applying the identical test,

> The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents. But when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations.

432 U.S. at 469-70.

The various defendants have suggested that the statute is supported by the state's legitimate interests in "fiscal frugality" and in protecting fetal life through the encouragement of childbirth. While the allocation of limited public

funds is a legitimate interest of the state, *see generally, Dandridge* v. *Williams,* 397 U.S. 471, 487 (1970), we do not believe that the Illinois funding policy is rationally related to this purpose. In fact, the record in this case supports the contrary conclusion that the costs of prenatal care, childbirth and postpartum care are substantially higher than the cost of abortions.[8] All of the births in question involve women who have encountered complications in their pregnancies, which would presumably increase the cost of needed medical care. Of course, if the newborn child then receives public aid, the cost diffential is even greater. The Illinois General Assembly was well aware of these potential cost differences, as shown by the remarks of Senator Lemke, Senate sponsor of P.A. 80-1091:

> My people don't want abortion being performed with their money. If it costs them more to support these children after they're born, they will pay that money gladly as long as it's properly used.

Debate on H.B. 333, Illinois Senate, June 27, 1977. In short, P.A. 80-1091 was not, and could not be, motivated by economic concerns.

The other state interest offered in support of the state classification is the protection of the fetus through the encouragement of childbirth. The Supreme Court has recognized this as a legitimate state interest in some circumstances. *See Maher* v. *Roe,* 432 U.S. 464 (1977); *Poelker* v. *Doe,* 432 U.S. 519, (1977); *Roe* v. *Wade,* 410 U.S. 113 (1973). In *Maher,* the Court held that Connecticut could

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8. Plaintiffs have produced convincing statistical evidence that the average State payment for an abortion is approximately $145.00, compared to an average cost to the State of $1,372.00 for funding a childbirth.

encourage "normal childbirth" by subsidizing the costs incident to childbirth while, at the same time, refusing to expend funds for *nontherapeutic* (purely elective) abortions. The Connecticut statute differed from the Illinois statute challenged here because it provided the funding of "medically necessary" abortions. We believe this distinction to be crucial to the determination of this case.

Under *Maher,* a state may legitimately prefer childbirth to an elective abortion. We do not believe, however, that a state has a legitimate interest in promoting the life of a non-viable fetus in a women for whom an abortion is medically necessary.[9] This approach, which recognizes

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9. *Poelker* v. *Doe,* 432 U.S. 519 (1977), does not require a contrary result. There a woman challenged a city policy that prohibited the performance of abortions in city-owned hospitals for reasons other than to save the mother from grave physiological injury or death. When plaintiff was examined by hospital physicians, however, physicians could not find "*any* medical reasons to justify an abortion," such as "severe sickness of the patient." 515 F. 2d at 543. Accordingly, the Court of Appeals treated the case as one where plaintiff demanded a "nontherapeutic" abortion. 515 F. 2d at 545. When the case was appealed, the Supreme Court adopted the lower court's characterization of the issue in upholding the city policy. 432 U.S. at 521. Because the Court viewed plaintiff's argument as an attack on the city's withholding of city-owned facilities for elective, or nontherapeutic abortions, *Maher* of course controlled. In this case, the plaintiff class is defined in terms of indigent women for whom abortions are medically necessary. We agree with plaintiffs that the Supreme Court could not have intended in its per curiam *Poelker* decision to obliterate the distinction it

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that the fetus is being carried within a living, human being, is consistent with Supreme Court decisions which suggest that the interest in the fetus cannot be isolated from the interest in the health of the mother. *See generally, Roe* v. *Wade,* 410 U.S. at 159; *Colautti* v. *Franklin,* 99 S. Ct. 675, 688 (1979).[10]

As a consequence of the state's viewing the fetus apart from the mother, the mother may be subjected to considerable risk of severe medical problems, which may even result in her death. Under the Hyde Amendment standard, a doctor may not certify a woman as being elegible for a publicly funded abortion except where "the life of the mother would be endangered . . . or . . . where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term. . . ." Most health problems associated with pregnancy would not be covered by this language, (Affidavit of Dr. Oren Richard Depp, p. 10, affidavit of Dr. David Zbaraz), and those that would be covered would often not be apparent until

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had carefully drawn in *Maher* between medically necessary and nontherapeutic abortions. We note, however, that at least two district courts have given *Poelker* v. *Doe* the sweeping interpretation we reject here. *Doe* v. *Mundy,* 441 F. Supp. 447, 451-52 (E.D. Wis. 1977); *Frieman* v. *Walsh,* No. 77-4171-CV-C (W.D. Mo. filed January 26, 1979).

10. *Colautti* v. *Franklin,* 99 S. Ct. 675 (1979) involved a challenge to a Pennsylvania statute which subjected a physician who performed an abortion to potential criminal liability if he failed to utilize a statutorily prescribed technique when the fetus was "viable," or when there was sufficient reason to believe that the fetus was viable. The Court stated:

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the later stages of pregnancy, when an abortion is more dangerous to the mother (Affidavit of Dr. Depp, pp. 4-5). At the earlier stages of pregnancy, and even at the later stages, doctors are usually unable to determine the degree of injury which may result from a particular medical condition (*Id.* at 4). The effect of the new criteria, then, will be to increase substantially maternal morbidity and mortality among indigent pregnant women (*Id.* at 12).[11]

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> Moreover, the second part of the standard directs the physician to employ the abortion technique best suited to fetal surival "so long as a different technique would not be *necessary* in order to preserve the life or health of the mother" (emphasis supplied). In this context, the word "necessary" suggests that a particular technique must be indispensable to the woman's life or health—not merely desirable—before it may be adopted.
>
> Consequently, it is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a "trade-off" between the woman's health and additional percentage points of fetal survival. Serious ethical and constitutional difficulties, that we do not address, lurk behind this ambiguity.

11. Moreover, the new Illinois criteria completely ignore the very serious threats to an indigent pregnant woman's psychological or psychiatric health that may make an abortion medically necessary. One doctor has estimated that approximately 15 per cent of a representative group of women desiring abortions have a psychiatric need for an abortion. He also concluded that indigent women are more likely than are non-indigent women to suffer adverse mental health consequences from unwanted pregnancy. (Affidavit of Dr. Peter Barglow, at 4, 6).

We cannot hold that a state has a legitimate interest in preserving the life of a non-viable fetus at the cost of increased maternal morbidity and mortality among indigent pregnant women. In *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250 (1974), the Supreme Court was faced with a challenge to an Arizona statute which required one year's residence in a county as a condition to receiving non-emergency hospitalization or medical care at the county's expense. In striking down the state statute as infringing on the fundamental right to interstate travel, the Supreme Court stated:

> Evaro was an indigent person who *required* continued medical care for the preservation of his health and well being . . . , even if he did not require immediate emergency care. The State could not deny Evaro just because, although gasping for breath, he was not in immediate danger of stopping breathing altogether. To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health. Cancer, heart disease, or respiratory illness, if untreated for a year, may become all but irreversible paths to pain, disability, and even loss of life. The denial of medical care is all the more *cruel* in this context, falling as it does on indigents who are often without the means to obtain alternative treatment.

415 U.S. at 260-61 (emphasis added). Like the Arizona statute in *Maricopa County,* the Illinois statute as modified will deny needed medical aid to indigent mothers until the point when a doctor is able to certify that the mother's life is endangered or when severe and long-lasting physical health damage[12] appears certain to occur. Action that

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12. The affidavits submitted by plaintiffs give many examples of medical conditions which would not be

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the Supreme Court characterized as "cruel" in *Maricopa County* can hardly be considered as a permissible side effect of a "legitimate" state interest in the present case.

As the Supreme Court recognized in *Roe,* however, the state's interest in promoting fetal life grows with the length of the pregnancy. At any point in the pregnancy term, the strength of the state's interest can only be determined by balancing "the relative weight of the respective interests involved." *Roe* v. *Wade,* 410 U.S. at 165.

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covered by the new Illinois standards, but which could pose a great threat to the safety of the mother. For example, the affidavit of Dr. David Zbaraz states, at pp. 5-6:

> The lack of certainty about predictions extends to even the most serious of potentially life-threatening conditions. For example, women with sickle cell disease have a 25 per cent probability of going into sickle cell crisis an dying as a result of pregnancy. (The normal mortality rate is 20 per 100,000). Because of this extra-ordinarily high mortality rate, abortions for women with sickle cell disease are almost universally acknowledged to be "medically necessary." I would thus actively counsel such women to have abortions, unless they expressed a very strong desire to have the child. Yet it simply cannot be known, however careful her care and physician's monitoring, whether a particular patient will go into crisis, or whether the state of her disease will remain unaffected by pregnancy. It would not be proper medical care to wait for such an actual threat before terminating the pregnancy, if the patient did not want to incur the risk. Yet the Illinois standard, by requiring certainty about the outcome of a pregnancy, does not comprehend this inherent uncertainty in medical judgment prior to the onset of actual health crises.

After the point of viability, for instance, that interest is regarded as "compelling," and justifies the proscription of abortion, except when it is necessary to preserve the life or health of the mother. 410 U.S. at 164.

Similarly, the state's interest in promoting the life of a fetus carried in a woman for whom an abortion is medically necessary is not constant. For the reasons just discussed, a pregnant woman's interest in her health so outweighs any possible state interest in the life of a non-viable fetus that, for a woman medically in need of an abortion, the state's interest is not legitimate. At the point of viability, however, "the relative weights of the respective interests involved" shift, thereby legitimizing the state's interest. After that point, therefore, we believe a state may withhold funding for medically necessary abortions that are not life-preserving, even though it funds all other medically necessary operations. We thus conclude that, as it applies to the abortion of a viable fetus, P.A. 80-1091 (as modifed by court order) is constitutional.

We recognize that, as with any standard that relies on the judgment of the individual administering it, "medical necessity" may be subject to deliberate misinterpretation and abuse. Some would argue that unscrupulous physicians, with the active encouragement of their indigent patients, will transform our decison into a *de facto* order that the state fund purely elective abortions. Such a result would, of course, be squarely contrary to the Supreme Court's *Maher* decison. Nonetheless, we believe the inherent elasticity of the standard we adopt today will pose no greater problem to the state's adminstration of its medical assistance programs than it did under the funding scheme that preceded P.A. 80-1091. Furthermore, we are encouraged by affidavits submitted by respected members of the medical professions that suggest that the percentage of abor-

tions any physican would deem "medically necessary" may be as low as one fifth of the representative cases in which a pregnant woman desires an abortion. ((Affidavit of Dr. Oren Depp, at 7). Finally, we note that providers of services under Illinois medical assistance programs are subject to civil and criminal penalties for filing false Medicaid reimbursement reports. 42 U.S.C. Section 1396h; Ill. Rev. Stat. ch. 23, Sections 12-15, 12-15.1.

CONCLUSION

We hold that the Hyde Amendment and P.A. 80-1091 are unconstitutional as applied to medically necessary abortions prior to the point of fetal viability. All parties are to appear on Monday, April 30, 1979, at 9:30 a.m. to discuss the problems of relief and notice. Plaintiffs are to prepare an appropriate judgment order and order granting injunctive relief for submission to the court on Monday, April 30, 1979.

DATED: April 29, 1978.

ENTER:

JOHN F. GRADY,
United States District Judge.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Presiding Judge, Honorable JOHN F. GRADY.

Cause No. 77 C 4522.

Date—April 30, 1979.

Title of Cause—ZBARAZ v. QUERN, and WILLIAMS and DIAMOND, and the UNITED STATES.

Brief Statement of Motion—Motion for Stay.

Motion by Intervening Defendants for stay pending final outcome of this case pending appeal is denied.

John F. Grady.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Presiding Judge, Honorable JOHN F. GRADY.

Cause No. 77 C 4522.

Date—April 30, 1979.

Title of Cause—ZBARAZ et al v. QUERN, etc. et al.

Hearing held on proposed injunction order. Motion of all defendants for stay pending appeal, denied. Motion by defendant Quern, to require federal reimbursement etc., is entered and taken under advisement.

Enter Final Judgment and Order—(Draft).

John F. Grady.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID ZBARAZ, M.D., et al., *Plaintiffs,* vs. ARTHUR F. QUERN, et al., *Defendants.*	No. 77 C 4522

FINAL JUDGMENT AND ORDER

On April 27, 1979, this Court issued a Memorandum Opinion which, *inter alia,* held Illinois' intended policy of denying reimbursement for all abortions under its medical assistance programs except those which it is required to fund under the District Court's modified injunction of February 15, 1979, unconstitutional as applied to medically necessary abortions performed prior to fetal viability. The District Court's previous May 15, 1978 Judgment and its June 13, 1978 Judgment, as modified by this February 15, 1975 Order, remain in force. But this Court directed plaintiffs to prepare an appropriate judgment order and order granting injunctive relief incident to the April 27, 1979 Memorandum Opinion for submission on April 30, 1979. Plaintiffs have done so. This Court has considered plaintiffs' proposed Decree, and now hereby ORDERS, ADJUDGES AND DECREES THAT:

1. This Court has jurisdiction over this case under 28 U.S.C. §§ 1343(3) and (4).

2. As used in this Judgment and Order, the following terms have the meanings indicated—

(a) "Recognized and legal medical providers" means all persons or institutions in Illinois who are certified to obtain reimbursement for medical services under the Illinois medical assistance programs;

(b) "Illinois medical assistance programs" means the Medicaid, state-funded General Assistance and Aid to the Medically Indigent programs, established pursuant to Ill. Rev. Stat., ch. 23, Arts. V-VII;

(c) "Indigent pregnant women" means pregnant women eligible for assistance under the Illinois medical assistance programs;

(d) "Medically necessary" as modifying "abortion" means an abortion which is necessary for the preservation of the life or the physical or mental health of a woman seeking such treatment, in the professional judgment of a licensed physician in Illinois, exercised in light of all factors relevant to her health;

(e) "Illinois' restrictive abortion funding policy" means the policy Illinois adopted pursuant to P.A. 80-1091, Ill. Rev. Stat. Supp. (1977), ch. 23, §§ 5-5, 6-1, 7-1, as modified by the District Court Order of February 15, 1979, and as described in the notices attached hereto as Exhibits A and B;

(f) "Fetal viability" means the point during pregnancy at which, in the professional judgment of a licensed physician in Illinois, a fetus is potentially able to live outside the mother's womb, albeit with artificial aid, such that there is a potentiality for meaning life, not merely momentary survival.

3. There are two plaintiff classes herein, certified pursuant to F.R.C.P. 23(a) and (b)(2). They consist of:

(a) all pregnant women eligible for the Illinois medical assistance programs for whom an abortion is medically necessary but not necessary for the preservation of their lives and who wish such abortion performed, and

(b) all Illinois physicians who are certified to obtain reimbursement for necessary medical services rendered to, and who perform medically necessary abortions for, persons eligible for the Illinois medical assistance programs.

4. Partial summary judgment is granted to both plaintiffs and defendants, as follows—

(a) Partial summary judgment is granted to plaintiffs that:

(i) Illinois' restrictive abortion funding policy and P.A. 80-1091, Ill. Rev. Stat. Supp. (1977), ch. 23, §§ 5-5, 6-1, 7-1, as applied by Illinois to deny funding, under the Illinois medical assistance programs, for medically necessary abortions performed prior to fetal viability, violate the equal protection clause of the Fourteenth Amendment to the United States Constitution;

(ii) The Hyde Amendment [Pub. L. 95-480, § 210, 92 Stat. 1586 (1978)], as construed by the 7th Circuit in *Zbaraz* v. *Quern,* —— F. 2d —— (Feb. 13, 1979) to permit Illinois to deny funding, under its Medical Assistance ("Medicaid") Program [Ill. Rev. Stat. ch. 23, Art. V; 42 U.S.C. §§ 1396ff.] for any medically necessary abortion performed prior to fetal viability, violates the Fifth Amendment to the United States Constitution.

(b) Partial summary judgment is granted to defendants that:

(i) Illinois' restrictive abortion funding policy and P.A. 80-1091, Ill. Rev. Stat. Supp. (1977), ch. 23, §§ 5-5, 6-1, 7-1, as applied by Illinois to deny funding under the Illinois medical assistance pro-

grams, for medically necessary abortions performed after fetal viability, do not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution.

(ii) The Hyde Amendment [Pub. L. 95-480, § 210, 92 Stat. 1586 (1978)], as construed by the 7th Circuit in *Zbaraz* v. *Quern,* —— F. 2d —— (Feb. 13, 1979) to permit Illinois to deny funding, under its Medical Assistance ("Medicaid") Program [Ill. Rev. Stat. ch. 23, Art. V; 42 U.S.C. §§ 1396ff.] for any medically necessary abortion performed after fetal viability, does not violate the Fifth Amendment to the United States Constitution.

5. Illinois' restrictive abortion funding policy and P.A. 80-1091, Ill. Rev. Stat. Supp. (1977), ch. 23, §§ 5-5, 6-1, 7-1, as applied to deny funding, under the Illinois Medical assistance programs, for medically necessary abortions performed prior to fetal viability, are, pursuant to 28 U.S.C. § 2201, declared to violate the equal protection clause of the Fourteenth Amendment to the United States Constitution. The Hyde Amendment [Pub. L. 95-480, § 210, 92 Stat. 1586 (1978)], as construed by the 7th Circuit in *Zbaraz* v. *Quern,* —— F. 2d —— (Feb. 13, 1979) to permit Illinois to deny funding, under its Medical Assistance ("Medicaid") Program [Ill. Rev. Stat. ch. 23, Art. V; 42 U.S.C. §§ 1396ff.] for any medically necessary abortion performed prior to fetal viability, is, pursuant to 28 U.S.C. § 2201, declared to violate the Fifth Amendment to the United States Constitution.

6. Defendant Arthur F. Quern, his agents, employees and all persons in active concert with him are permanently enjoined from—

(a) enforcing Illinois' restrictive funding policy and P.A. 80-1091, Ill. Rev. Stat. Supp. (1977), ch. 23, §§ 5-5, 6-1, 7-1, to deny payments under the Illinois medical assistance programs to any recognized and legal providers for the rendition of medical services to indigent pregnant women for medically necessary abortions performed prior to fetal viability, or to deny such payments on behalf of any such indigent pregnant women for such abortions; and

(b) directing notice to any recognized and legal medical providers, or to persons receiving assistance under the Illinois medical assistance programs, that any medically necessary abortions performed prior to fetal viability, are not, or will not be, a covered service under the Illinois medical assistance programs.

7. Within 21 days from the entry of this Decree, or within such additional time as this Court may allow, defendant Quern is ORDERED TO—

(a) direct, by first-class mail, to all recognized and legal medical providers notices, certification forms, and revisions to the Handbook for Physicians, which explain, completely, the terms of ¶ 6(a) herein, and of the means by which such providers can secure reimbursement for medically necessary abortion services. (Defendant is further ORDERED to furnish such notices, forms and revisions to plaintiffs' attorneys at least seven working days prior to their official promulgation.);

(b) direct, by first-class mail, the notice attached hereto as Exhibit C (printed in English and Spanish) to all Illinois medical assistance program recipients who may be affected by this Decree.

8. (a) The question of defendants' liability for attorneys' fees, and the amount of such fees to plaintiffs, is reserved until further order of this Court. Plaintiffs need not submit

any claim for attorneys' fees until such time as this Court considers this question.

(b) Costs are awarded to plaintiffs.

ENTER:

JOHN F. GRADY,
United States District Judge.

DATED: April 30, 1979

STATE OF ILLINOIS
DEPARTMENT OF PUBLIC AID
NOTICE

TO: Physicians, Hospitals and Ambulatory Surgical Centers.

FROM: Illinois Department of Public Aid

RE: REIMBURSEMENT FOR ABORTIONS

Effective May 1, 1979, the Department of Public Aid, under Illinois law, as limited by the federal court, cannot pay for abortions except for three (3) specific reasons which are coded and described below. Payment can only be made after receipt of the new document "Application For Payment For Abortion", Form DPA 2217, which must be submitted with the billing code.

When billing on Form DPA 132, Physician's Statement of Services Rendered, for induced abortions that are reimburseable by the Department, please use the appropriate procedure code. The codes are as follows:

Code 59730 *Mother's Life Endangered*
The professional judgment of the physician that the life of the mother would be endangered if the fetus were carried to term.

Code 59740 *Severe and Long Lasting Health Damage*
The professional judgment of the physician that severe and long lasting physical health damage to the mother would result if the pregnancy were carried to term.

Code 59750 *Rape or Incest*

Illinois state law as limited by the federal court prohibits Medicaid payment for abortions for rape or incest unless the abortion would meet certain federal financial participation requirements, including the requirement that Illinois Department of Public Aid must receive signed documentation from a law enforcement agency or public health service stating:

a) The person upon whom the medical procedure was performed was reported to have been the victim of an incident of rape or incest;

b) The date on which the incident occurred;

c) The date on which the report was made which must have been within 60 days of the date on which the incident occurred;

d) The name and address of the victim and the name and address of the person making the report (if different from the victim); and

e) That the report include the signature of the person who reported the incident.

The Department of Health, Education and Welfare has stated that a provider who performs the procedure withing having the necessary documentation in hand does so at the risk of not receiving payment if the documentation is not forthcoming to the Illinois Department of Public Aid. The Illinois Department of Public Aid will pay for abortions required because of rape or incest only

when it has received the federally required documentation, or if the abortion was also necessary for the other federally reimburseable reasons as previously defined.

Hospitals, when billing the Department of Public Aid for abortions as defined in this release, are to attach a copy of the completed Application for Payment For Abortion, Form DPA 2217, to the hospital billing statement.

Attached is a copy of the Application For Payment For Abortion, Form DPA 2217. Form 1862 and any revised editions of Form 1862 will be obsolete and should not be used for services rendered after May 1, 1979.

Supplies of the Application For Payment For Abortion are maintained centrally and may be obtained by writing:

Provider Services Section
Post Office Box 4034
Springfield, Illinois 62708

If you wish, you may call (217) 782-1426.-

EXHIBIT "A"

STATE OF ILLINOIS
DEPARTMENT OF PUBLIC AID

TO: RECIPIENTS OF AFDC, AABD, MANG, GA, AMI OR FOSTER CARE

RE: ABORTION SERVICES DATE: March 22, 1979

The Illinois Department of Public Aid will no longer pay for abortions performed on or after May 1, 1979, under any of the medical programs it administers, except where:

(a) a doctor has determined that the life of the mother would be endangered if the fetus were carried to term; or

(b) two doctors have determined that severe and long lasting physical health damage to the mother would result if the pregnancy were carried to term; or

(c) the abortion (or other medical procedure) is necessary for a victim of rape or incest, which such rape or incest has been reported promptly to a law enforcement agency or public health service.

NOTE: This report must be made within 60 days of the incident and must show the name and address of the victim and the date of the incident. It must show the name, address and signature of the person making the report and the date of the report.

Doctors and hospitals will not be able to accept medical identification cards for abortions except as specified above.

This action is being taken because state law (Ill. Rev. Stat. 5-5, 6-1 and 7-1), as limited by federal court rulings, prohibits IDPA from paying for any abortions other than those specified above.

YOU HAVE THE RIGHT TO APPEAL
THIS DECISION

At any time, within 60 days following the above "DATE" you have the right to appeal this decision and be given a fair hearing. Such an appeal must be in writing and filed with the Department. You may represent yourself at this hearing or you may be represented by any one else, such as a lawyer, relative or friend. Your local office will provide you with an appeal form and will help you fill it out if you wish.

EXHIBIT "B"

STATE OF ILLINOIS
DEPARTMENT OF PUBLIC AID

TO: RECIPIENTS OF AFDC, AABD, MANG, GA or AMI, or FOSTER CARE

RE: ABORTION SERVICES DATE: May ——, 1979

ILLINOIS DEPARTMENT OF PUBLIC AID MUST PAY FOR MEDICALLY NECESSARY ABORTIONS

A Federal Court has ruled that the Illinois Department of Public Aid must pay for all abortions for pregnant women eligible for one of its medical assistance programs (Medicaid, General Assistance Medical, Aid to the Medically Indigent), if the abortion is "medically necessary" and performed prior to "fetal viability." An abortion is deemed to be "medically necessary" for a pregnant woman if the woman's doctor (in his/her professional judgment, exercised in light of all factors relevant to her well-being) deems is to be necessary for the preservation of her life or health. "Fetal viability" is usually placed at about seven months (28 weeks), but may occur earlier, even at 24 weeks.

If an eligible pregnant woman has an abortion after fetal viability, the Department of Public Aid will pay for such an abortion only where:

(a) a doctor has determined that the life of the mother would be endangered if the fetus were carried to term; or

(b) two doctors have determined that severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term.

In addition, the Department of Public Aid will pay for an abortion (or other medical procedure) when it is necessary for a victim of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service. (A pregnant woman under 18 is considered to have been the victim of rape, even if she was not forced to have sexual relations.) Note that under Illinois law, the required report must be made within 60 days of the incident and must show the name and address of the victim and the date of the incident. It must show the name, address and signature of the person making the report and the date of the report.

Because of the federal court ruling noted above, and previous federal court rulings, doctors, hospitals and clinics are now able to get paid for medical services for the types of abortions described above. Therefore, medical identification (green) cards can be presented for such abortion services, as for other types of medical services.

You may previously have been sent one or more other notices which said that the Department of Public Aid would *not* pay for most of the abortions described above. Please disregard such notices. They are no longer in effect.

Arthur F. Quern, Director
Illinois Department of Public Aid

EXHIBIT "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID ZBARAZ, M.D., etc., et al.,
Plaintiffs,
vs.
ARTHUR F. QUERN, etc., et al.,
Defendants.
No. 77 C 4522

AMENDED
NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Defendant, ARTHUR F. QUERN, Director, Illinois Department of Public Aid, by and through his attorney, WILLIAM J. SCOTT, Attorney General, State of Illinois, hereby appeals to the Supreme Court of the United States pursuant to 28 U.S.C. § 1252 from the Memorandum Opinion dated April 29, 1979, and the Final Judgment and Order dated April 30, 1979, and docketed May 2, 1979, granting partial summary judgment for the plaintiffs, in the United States District Court for the Northern District of Illinois, Eastern Division, by the Honorable John F. Grady.

Defendant prays that the Final Judgment and Permanent Injunction be reversed.

The parties to this Order and the names and addresses of their respective attorneys are:

1. Plaintiffs-appellees who are represented by Robert W. Bennett, Esquire, 357 East Chicago Avenue, Chicago, Illinois 60611.
2. Plaintiffs-appellees, Zbaraz and Motew, who are represented by David Goldberger, Esquire, and Lois Lipton, Esquire, Roger Baldwin Foundation of ACLU, Inc., 5 South Wabash Avenue, Chicago, Illinois 60603.
3. Plaintiffs-appellees, Doe and Chicago Welfare Rights Organization, who are represented by Aviva Futorian, Esquire, Robert E. Lehrer, Esquire, Wendy Meltzer, Esquire, and James D. Weill, Esquire, Legal Assistance Foundation of Chicago, 343 South Dearborn Street, Chicago, Illinois 60604.
4. Defendant-appellant, Arthur F. Quern, Director of the Illinois Department of Public Aid, who is represented by William J. Scott, Attorney General, State of Illinois, William A. Wenzel, Special Assistant Attorney General (Of Counsel), 130 North Franklin, Suite 300, Chicago, Illinois 60606.
5. Defendants-appellants intervenors, Jasper F. Williams, M.D., and Eugene F. Diamond, M.D., who are represented by Patrick A. Trueman and John D. Gorby, Americans United for Life Legal Defense Fund, 230 North Michigan, Suite 515, Chicago, Illinois 60601.
6. Defendant-appellant intervenor, United States of America, which is represented by Jonathon Ginsburg, United States Department of Justice, Civil Division, 10th and Pennsylvania, N.W., Washington, D.C. 20530 and James Hynes, Assistant United States Attorney, 219 South Dearborn Street, Chicago, Illinois 60604.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General,
State of Illinois.

WILLIAM A. WENZEL,
Special Assistant Attorney
General (Of Counsel),
130 North Franklin, Suite 300,
Chicago, Illiois 60606 (793-2380).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID ZBARAZ, M.D., etc., et al.,
Plaintiffs,
vs.
ARTHUR F. QUERN, etc., et al.,
Defendants.
No. 77 C 4522

NOTICE OF FILING

TO: See attached list.

PLEASE TAKE NOTICE that on the 8th day of May, 1979, the attached AMENDED NOTICE OF APPEAL was filed with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, at the United States Courthouse, 219 South Dearborn Street, Chicago, Illinois.

WILLIAM J. SCOTT,
Attorney General,
State of Illinois.

WILLIAM A. WENZEL,
Special Assistant Attorney
General (Of Counsel),
130 North Franklin, Suite 300,
Chicago, Illiois 60606 (793-2380).

CERTIFICATE OF SERVICE

The undersigned being first duly sworn upon oath deposes and says that a copy of the foregoing was served upon the above named at the above address by depositing same in the United States mail chute at 160 North LaSalle, Chicago, Illinois on May 8, 1979.

..... BRYNES.

SUBSCRIBED and SWORN to
before me this 8th day
of May, 1979.

.....
NOTARY PUBLIC